

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

CAROLYN CHANDLER,  
Appellant,

v.

SOCIAL SECURITY ADMINISTRATION,  
Agency.

DOCKET NUMBER  
CB-7121-98-0008-V-1

DATE: JAN 6 1999

James C. Young, AFGE Council 147, San Francisco, California, for the  
appellant.

Joyce W. Emrick, San Francisco, California, for the agency.

**BEFORE**

Ben L. Erdreich, Chairman  
Beth S. Slavet, Vice Chair  
Susanne T. Marshall, Member

**OPINION AND ORDER**

¶1 The appellant has filed a timely request for review of the December 21, 1997 arbitration decision that affirmed the agency's decision to remove her. For the reasons set forth below, we GRANT the appellant's request and SUSTAIN the arbitration decision.

**BACKGROUND**

¶2 Effective December 23, 1996, the agency removed the appellant from her GS-11 Claims Representative position based upon charges that she violated 42 U.S.C. § 408(a)(6) and the Social Security Administration (SSA) Standards of Conduct. Request for Review (RFR) File, Tab 1, Subtab 3. In its first charge, the agency

claimed that the appellant violated 42 U.S.C. § 408(a)(6) when she assisted her fiancé in obtaining a second social security number (SSN).<sup>1</sup> RFR File, Tab 1, Subtab 2 at 1-2. In its second charge, the agency alleged that the appellant violated an SSA standard of conduct.<sup>2</sup>

¶3 The appellant elected to pursue an appeal of her removal through the negotiated grievance procedure, and the matter was eventually submitted to arbitration. The arbitrator sustained the agency's second charge but not its first, found that the appellant failed to prove her claim of reprisal for EEO activities, and affirmed the agency's removal action. RFR File, Tab 1, Subtab 1. In her timely request for review of the arbitrator's decision, the appellant claims that the arbitrator erroneously sustained the second charge, failed to explain his credibility determinations concerning her reprisal defense, and failed to review the agency's penalty selection. The agency opposes the request for review.<sup>3</sup> RFR File, Tab 3.

### ANALYSIS

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<sup>1</sup> Specifically, the agency charged that the appellant violated 42 U.S.C. § 408(a)(6), which states, "Whoever willfully, knowingly, and with intent to deceive the Secretary as to his true identity (or the true identity of any other person) furnishes or causes to be furnished false information to the Secretary with respect to any information required by the Secretary in connection with the establishment and maintenance of the records . . ." violates the Social Security Act. RFR File, Tab 1, Subtab 2 at 1-2.

<sup>2</sup> Specifically, the agency charged that the appellant violated "Conduct on the Job (73.735-601) - Participation on Behalf of a Friend, Relative, or Coworker," which states that "[e]mployees may not participate in the technical development, adjudication, or review of a matter which may result in entitlement to a social security benefit for themselves, their relatives, friends, or fellow office workers. When this situation arises during the course of regular work, employees shall disqualify themselves and refer the matter to their supervisor. The matter may not be referred to a subordinate employee. When immediate disqualification and referral is not practicable, the employee shall submit the action for review by the supervisor as soon thereafter as possible." RFR File, Tab 1, Subtab 2 at 2-3.

<sup>3</sup> We have not considered the parties' submissions that were filed after the close of the record because they were not accompanied by a showing of good cause for their untimely filing. RFR File, Tabs 4, 5.

The appellant's request for review falls within the Board's jurisdiction.

¶4 The Board may review an arbitration decision under 5 U.S.C. § 7121(d) if the employee alleges that she has been affected by a prohibited personnel practice under 5 U.S.C. § 2302(b)(1) and if the action is otherwise appealable to the Board under 5 U.S.C. § 7702. *See Belldina v. Department of Justice*, 50 M.S.P.R. 497, 500 (1991). The appellant alleged that her removal, an otherwise appealable action, was in retaliation for her participation in EEO activities. Reprisal for EEO activities constitutes a cognizable claim under 5 U.S.C. § 2302(b)(1). *See Cosio v. Department of Justice*, 65 M.S.P.R. 691, 695 (1994). The appellant's request for review, therefore, is properly before the Board.

The record does not establish that the arbitrator erred in interpreting civil service law, rule, or regulation in this case.

¶5 Arbitration awards are entitled to a greater degree of deference than initial decisions issued by the Board's administrative judges. *See Benson v. Department of the Navy*, 65 M.S.P.R. 548, 554 (1994). Thus, the Board will modify or set aside an arbitration award only where the arbitrator has erred as a matter of law in interpreting civil service law, rule, or regulation. *See Hayes v. Department of Labor*, 65 M.S.P.R. 214, 217 (1994). Even if, after reviewing the facts of a case, the Board would disagree with the arbitrator's decision, the Board cannot, absent legal error, substitute its conclusions for the arbitrator's. *See Benson*, 65 M.S.P.R. at 554.

¶6 The arbitrator found that the agency's first charge could not be sustained. RFR File, Tab 1, Subtab 1 at 6. The agency suggests that the arbitrator's decision actually sustained the first charge by implication. Because the findings supporting the second charge included a determination that the appellant's actions were committed to assist a fraud, the agency argues that a central element of the first charge was proved. RFR File, Tab 3 at 2. This argument is meritless. Whatever ambiguity arises from the arbitrator's findings in this regard is plainly

dispelled by his specific rejection of the first charge, and does not support a review of the disposition of that charge. *See Girani v. Federal Aviation Administration*, 924 F.2d 237, 242 (Fed. Cir. 1991), quoting *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960).

¶7 The appellant argues that the arbitrator erroneously sustained the second charge. The agency alleged in its second charge against the appellant that she violated SSA Standard of Conduct 73.735-601, "Conduct on the Job-Participation on behalf of a Friend, Relative, or Coworker," when she completed her fiancé's application for a second SSN and took him to a friend and co-worker who accepted the application for processing and falsely certified that she had reviewed acceptable documentary evidence. RFR File, Tab 1, Subtab 2 at 2-3. The arbitrator found that the agency failed to show that the appellant orchestrated a scheme to get her fiancé's application processed by the co-worker. RFR File, Tab 1, Subtab 1 at 5. He did, however, find that the agency showed that the appellant deliberately failed to put check marks in the blocks on her fiancé's application indicating prior application and issuance of a Social Security card and that such conduct amounted to a collaboration intended to abet the perpetration of a fraud. *Id.* at 6-8. Based upon this finding, the arbitrator sustained what he characterized as the agency's second charge, i.e., that the appellant violated the agency's rule that an employee is prohibited from assisting a friend in obtaining a Social Security card. *Id.* at 8. This is a specific finding, not in conflict with the Board's substantive law, and is therefore entitled to our deference. *See Benson*, 65 M.S.P.R. at 554.

¶8 To the extent that the appellant argues, RFR File, Tab 1 at 5, that the arbitrator erred in interpreting the agency's on-duty standard of conduct to include the off-duty misconduct alleged here, the Board will not review arguments not raised before the arbitrator. *See Means v. Department of Labor*, 60 M.S.P.R. 108, 115-16 (1993). There is no transcript in the record before us, and nothing else in the

record indicates that this argument was raised below. In any event, the contention is meritless. Where the appellant has *deliberately* violated the rule, as found by the arbitrator, by filling out her fiancé's application for a social security number but knowing that he already had a valid SSN, the act performed is unarguably and inseparably enmeshed in the duties and responsibilities of her official position. The Board has long recognized that an employee's misconduct outside business hours, or even on leave, is punishable if it involves acts directly related to the employee's duties and responsibilities, or the employment relationship itself. *See Social Security Administration v. Manion*, 19 M.S.P.R. 298, 315-16 (1984) (an employee is answerable for misconduct related to his employment, even if on leave or after work hours).

¶9 Further, although the appellant questions the arbitrator's credibility determinations, RFR File, Tab 1 at 8, we are also unable to assess such determinations without access to tapes or a transcript of the hearing. The appellant seeking review has the burden of providing the Board with materials necessary to support matters raised on review, including such transcripts or tapes. *See* 5 C.F.R. § 1201.154(d)(4).

The appellant has failed to show that the arbitrator's findings regarding her reprisal claim constitute error.

¶10 The appellant claims that the arbitrator did not adequately explain why he found the management officials' testimony on the reprisal issue so convincing. RFR File, Tab 1 at 8. An arbitrator's finding that an appellant did not prove her retaliation claim is a factual determination entitled to deference unless the arbitrator erred in his legal analysis. *See Hayes*, 65 M.S.P.R. at 219. The arbitrator rejected "the notion of removal as reprisal" finding that the "reprisal defense was based on conjecture, lacking persuasive supporting proof" and that the agency produced "credible witnesses whose individual and collective denial of reprisal exceeded the preponderance level and approached the beyond a

reasonable doubt and to a moral certainty scale." RFR File, Tab 1, Subtab 1 at 2-3. The appellant's assertion that she submitted documents establishing a strong prima facie case of reprisal and that the arbitrator failed to address why the testimony of management officials was so convincing is a challenge to the arbitrator's factual findings underlying his credibility determinations. *See Hayes*, 65 M.S.P.R. at 218. The arbitrator's failure to mention all of the evidence of record does not mean that he did not consider it in reaching his decision. *Id.* Therefore, we defer to the arbitrator's factual findings regarding the credibility of the agency's witnesses and find no basis upon which to disturb the holding that the appellant did not prove reprisal.

Removal is a reasonable penalty.

¶11 The appellant asserts that the arbitrator failed to review the agency's penalty selection. When, as here, not all of the charges are sustained, the relevant *Douglas* factors will be independently and responsibly balanced to determine a reasonable penalty. *See White v. U. S. Postal Service*, 71 M.S.P.R. 521, 527 (1996). We agree that the arbitrator's opinion and award is devoid of an indication that factors relevant to the penalty selection were considered under *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1980). In the complete absence of any such indication, as here, *see* Arbitration Decision, RFR File, Tab 1, Subtab 1 at 7-8, the penalty selection is not entitled to deference, and the Board will perform the proper analysis. *See Belldina*, 50 M.S.P.R. at 501-02 (arbitrators are required to review an agency disciplinary action under the same rules as the Board; erroneous penalty selection requires the Board to perform *Douglas* analysis).

¶12 The appellant had more than 12 years of service and no prior disciplinary record with the agency at the time of her removal. It is undisputed that her performance was otherwise satisfactory during that time. Nevertheless, the sustained misconduct represents a fundamental breach of trust and goes to the

heart of the employment relationship. As found by the arbitrator, and we agree, the appellant's actions were more than a mere accommodation of a friend. Given the deliberate nature of the misconduct and its potential for harm to the agency's basic mission, the seriousness of this particular violation fully supports removal as the appropriate penalty, despite the appellant's satisfactory work record. The appellant was on notice of the agency's proscription against the type of assistance she provided, and her actions constituted a knowing abuse of the trust placed in her. (We note that these factors were thoroughly reviewed by the agency in its initial penalty selection. *See* RFR File, Tab 3, Subtab D at 2-4).

¶13 Additionally, the arbitrator's finding that the appellant abused her position with the intent to abet her fiancé's fraud is an aggravating circumstance of the most serious nature. *See* RFR File, Tab 1, Subtab 1 at 8. Her misconduct in fact resulted in the issuance of an illegal second SSN to her fiancé. She must clearly have known that such would be the likely consequence, especially in light of her deliberate omission from her fiancé's application of the specific information required to prevent such subterfuge. Upon our review of the relevant *Douglas* factors, particularly factors 2 and 5, *see* RFR File, Tab 3, Subtab D at 2-3, and based upon the factual findings of the arbitrator, to which we defer, we find that the seriousness of the offense under these circumstances warrants the appellant's removal from Federal service.

¶14 Accordingly, we find no basis upon which to modify or to set aside the arbitration decision.

#### ORDER

¶15 This is the final order of the Merit Systems Protection Board in this request for review. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING  
FURTHER REVIEW RIGHTS

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. *See* 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission  
Office of Federal Operations  
P.O. Box 19848  
Washington, DC 20036

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. 5 U.S.C. § 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.



Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(b)(1). You must submit your request to the court at the following address:

United States Court of Appeals  
for the Federal Circuit  
717 Madison Place, N.W.  
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

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Robert E. Taylor  
Clerk of the Board

Washington, D.C.